TRANSCOM RAND (M) SDN BHD

v.

MARA HOLDINGS SDN BHD;
OMAR JOHAR (THIRD PARTY)

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[SUIT NO: D1-22-556-1996]
12 NOVEMBER 2001

CIVIL PROCEDURE: *Want of prosecution - Delay in prosecuting action - Whether there was inordinate and inexcusable delay by plaintiff in management of case - Whether delay could be attributed to default of plaintiff's counsel handling matter - Whether defendant's application for dismissal of plaintiff's action should be granted - Whether defendant contributed to delay - Whether application should have been made before court sent notice to show cause*

The plaintiff filed a writ of summons and statement of claim on 17 August 1996 against the defendant for a sum of RM5,453,260 for loss incurred due to a breach of a purported agreement. The defendant denied the claim. The plaintiff took out a summons for direction heard on 16 December 1997. The plaintiff was ordered to set the matter down for trial within 60 days from the date thereof, *ie*, by 14 February 1998. No action was taken by the plaintiff until after the issuance of a Notice to Show Cause dated 20 July 2000 by the court. As directed by the show cause letter, the parties appeared before the learned judge on the morning of 16 August 2000. The learned judge decided not to dismiss the action but adjourned the hearing of the show cause notice to 23 October 2000. However, in the afternoon on the same day, *ie*, 16 August 2000, the plaintiff filed a Notice of Intention to Proceed. Then on 10 October 2000 the plaintiff filed the Notice to Set Down Action for Trial with Form 63 to request the court for pre-trial case management. When the Notice to Show Cause came up again in the morning of 23 October 2000 for hearing, the defendant informed the court that the 3rd party passed away and that an application for dismissal of the plaintiff's action was filed on 12 September 2000 under O. 34 r. 8(1) of the Rules of the High Court 1980 ('RHC').

The senior assistant registrar ('SAR') however, dismissed the defendant's application to dismiss the plaintiff's action for want of prosecution under O. 34 r. 8(1) RHC. The defendant now appealed before this court and the issues for determination, *inter alia*, were: (1) whether there was inordinate and inexcusable delay by the plaintiff in the management of its case; (2) whether the defendant had been prejudiced by the delay because one of its witnesses

had passed away ('deceased witness') and another suffered from diabetes; and (3) whether the conduct of the defendant itself did not entitle it to the order sought for dismissal of the plaintiff's action.

The plaintiff claimed that the defendant had gone into deep slumber before being jolted to action by the court's Notice to Show Cause. Further, the post-summons delay on its part was attributed to its then counsel who had failed to file the relevant cause papers and set the action down for trial within the requisite time.

Held:

[1] There was no pre-trial delay as the claim was filed on 17 August 1996 on a cause of action that arose only on or about 21 March 1996 when the defendant gave notice of its intention to repudiate the said agreement. (p 507 f-g)

[2] There was inordinate and inexcusable post-action delay by the plaintiff in the management of its case as it is trite law that any shortcoming in the running of a law office would not constitute reasonable grounds for an exercise of a court's discretion. As the parties in a suit are a constant feature in a case, any default committed by their counsels ought to be ascribed, attributed and assigned to the litigant concerned. (p 508 a-b)

[3] The defendant had suffered no serious prejudice or substantial risk that a fair trial was not possible for the following reasons: (1) the deceased witness had died on 16 December 1997 which was the same day the Order for Directions was made. Therefore, even if the Order for Directions had been complied with, the defendant would have had to prepare for trial without the oral testimony of the deceased witness. In any event it would have been expected that when the action was filed, a witness statement or a statutory declaration would have been taken from the deceased witness; (2) the other witness left the employ of the defendant before the commencement of the action and neither was there any evidence adduced to prove that the said witness was seriously ill nor was there any affidavit by him to this effect; (3) the defendant could produce other witnesses who were also party or privy to the matters in the instant action for example one Mr. Hatta. If indeed there was any prejudice suffered by the defendant, it could be due to the defendant not conscientiously preparing its defence in this matter. (p 508 b-h)

[4] Prior to the hearing of the show cause on 16 August 2000, the defendant had also failed to comply with the Order for Directions dated 16 December 1997 by failing to file and serve a list of documents and to offer the said documents for inspection. (p 508 h-i)

[5] Under the old O. 34 r. 8 RHC, the court could give the notice to show cause if the defendant had not made an application to dismiss the action under sub-r. (1) thereof. Unfortunately, the defendant made the application under sub-r. (1) only after this court had invoked its powers under sub-r. (2). This sequence in the procedural management of a case was of material consideration on the question of the defendant's own conduct which did not entitle it to the court's assistance. It followed therefore that the defendant had also contributed to the post-summons delay. Also, as the defendant did not lodge any application under the old O. 34 r. 8(1) RHC before the Notice to Show Cause, it could not now come with an application for dismissal for want of prosecution under the same provision. (pp 509 a-i & 510 b-c)

[6] Since the filing of the Notice to Set Down Action for Trial on 10 October 2000, the defendant had continued to pursue this course of action to dismiss the plaintiff's action for want of prosecution, which by itself, was exacerbating the very delay and prejudice the defendant alleged had occurred. The defendant would have been better served if it girds itself to defend the action on the merits. Ultimately, the onus was still on the plaintiff to prove its claim herein. (p 511 c-d)

Per curiam:

[1] In *Birkett v. James* the consequence of inordinate delay was not a consideration which was in issue. From now on it was going to be a consideration of increasing significance. Litigants and their legal advisers had therefore recognise that in the future any delay which occurred would be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it was, but also in relation to other litigants and the prejudice which was caused to the due administration of justice. The existing rules contained time limits which were designed to achieve the disposal of litigation within reasonable time scale. Those rules should be observed (*Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors)*. (p 498 g-h)

[Decision of SAR affirmed, defendant's appeal dismissed.]

Case(s) referred to:

Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors, Chishty Coveney & Co v. Raja (TLR 29 December 1997) ***(refd)***

Birkett v. James [1978] AC 297 ***(refd)***

Biss v. Lambeth, Southmark and Lewisham Area Health Authority [1978] 2 All ER 125 ***(refd)***

Choraria v. Sethia (TLR 29 January 1998) ***(refd)***

Department of Transport v. Chris Smaller (Transport) Ltd [1989] AC 1197 ***(refd)***

Grovit v. Doctor [1997] 1 WLR 640 ***(refd)***
Lee Boon Tin v. Trustees of Leong San Tong Khoo Kongsi [1996] 2 BLJ 268 ***(refd)***
Lee Mun Tuck v. Tan Chin Kah & Anor [1991] 1 CLJ 631; [1991] 4 CLJ (Rep) 929 ***(refd)***
Nasri v. Mesah [1971] 1 MLJ 32 ***(refd)***
Public Finance v. Natcom Development Sdn Bhd & Ors [1996] 4 CLJ 291 ***(refd)***
Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd [1985] 1 CLJ 541; [1985] CLJ (Rep) 266 ***(refd)***
Te Cheng Hoi v. Peh Im Kweng [1994] 3 CLJ 501 ***(refd)***
Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v. Lee Boon Tin [1998] 4 CLJ 368 ***(refd)***
United Malayan Banking Corporation Bhd v. Palm and Vegetable Oils (M) Sdn Bhd [1994] 3 CLJ 144 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 34 rr. 2(1), (2), 3(2), 8(1), (2)

Civil Procedure Rules 2000 [UK], rr. 1.4(2)(b), (c), (g), (l), 3.3(3), 3.4, 24.2
Rules of Court [Sing], O. 34A r. 1(1)

For the appellant/defendant - Lambert Rasaratnam (Yap Boon Hau); M/s Lee Hishammuddin
For the respondent/plaintiff - Yoong Sin Min (Michael Lum Kah Heng); M/s Shook Lin & Bok

Reported by Usha Thiagarajah

JUDGMENT

Vincent Ng J:
This is the corporate defendant's ('defendants') appeal against the learned senior assistant registrar's (SAR) decision on 16 January 2001 dismissing the defendants' application dated 12 September 2000 under O. 34 r. 8 of the Rules of the High Court 1980 (RHC) (since repealed when the Rules of the High Court (Amendment) 2000 *vide* P.U.(A) 342/00 came into effect on 22 September 2000) to dismiss the corporate plaintiff's ('plaintiffs') action for want of prosecution.

Background Facts
In the statement of claim it was averred that the plaintiffs and the defendants had entered into an agreement, partly oral and partly in writing, under which the defendants were to purchase an integrated voice and data communication system ('the System') from the plaintiffs. And, that they were also to provide maintenance service for the System, and, that a binding contract was concluded on 4 February 1994. The plaintiffs contend that the draft proposal, draft sale and licence agreement and letters dated 20 November 1993 and 4 February 1994 constituted the written part of the purported agreement. And, that discussions held from 14 October 1993 to 16 October 1993 between Encik

Mohd. Desa Akib on behalf of the defendants and Encik Frank McQuillin on behalf of the plaintiffs comprised the oral part of the purported agreement. The gravamen of the plaintiffs' cause of action was that the defendants have breached the purported agreement by their refusal to allow the plaintiffs to commence the project, their refusal to confirm the commencement date which emanate from their denial of the existence of contract. Based on this, the plaintiffs claim from the defendants the sum of RM5,453,260 for loss of profit. The writ of summons and statement of claim were filed on 17 August 1996.

The defendants denied these allegations. Their reasons are as set out in the statement of defence. After the close of pleadings, a summons for direction was taken out by the plaintiffs, which was heard on 16 December 1997, and one of the orders made was that the plaintiffs were to set the matter down for trial within 60 days from the date thereof. This meant by 14 February 1998. After the hearing of the summons for direction on 16 December 1997, no action was taken by the plaintiffs until after the issuance of the show cause letter dated 20 July 2000 from the court. As directed by the show cause letter, the parties appeared before Dato' Mohd Ghazali bin Mohd Yusoff J on 16 August 2000. In the morning of 16 August 2000, with the affidavit of Mr. Tan Swee Hock (affirmed on 14 August 2000) before him the learned judge decided not to dismiss the action but adjourned the hearing of the show cause notice to 23 October 2000 for the plaintiffs to do whatever needed to be done. Shortly thereafter, at 1.49pm on 16 August 2000 the plaintiffs filed a notice of intention to proceed. Then, on 19 September 2000 they filed a list of documents and an affidavit verifying the list. Soon thereafter, on 10 October 2000 the plaintiffs filed the request and notice to set down action for trial coupled with Form 63 to request the court for pre-trial case management. When the notice to show cause came up again in the morning on 23 October 2000 for hearing, the defendants' counsel informed the court that the 3rd party had passed away and that he had filed an application for dismissal of the suit under O. 34 r. 8(1) (being encl. 25). And, later in the day on the same date, the defendants filed a list of documents and an affidavit verifying it.

Before the SAR on 16 January 2001 the defendants alleged that there was both pre-summons and post-summons delay and that the cumulative effect of the delay had prejudiced the defendants. This was challenged by the plaintiffs who further claimed that the defendants had also gone into deep slumber before being jolted to action by the court's said notice to show cause dated 20 July 2000.

The Law

The topic of dismissal of a case for want of prosecution attracts a multi-faceted discussion on various aspects of the law on the topic.

The formative principles governing dismissal for want of prosecution was originally set out by Lord Diplock in *Birkett v. James* [1978] AC 297 in the following terms:

> The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg, disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

In *Choraria v. Sethia* (TLR 29 January 1998) it was submitted by Mr. James Munby, QC, for the defendant that the House of Lords in *Grovit v. Doctor* [1997] 1 WLR 640 had held that abuse of process was "a separate ground for striking out or staying an action which does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible". Thus, there appears to be a misconception that the source or genesis of this new approach on the question of prejudice was *Grovit v. Doctor (supra)*. In other words, it was said that in *Grovit*, the House of Lords had made significant inroads on the principles enunciated in *Birkett v. James*. This was not what was decided as, in *Grovit*, Lord Woolf made clear that:

> Certainly this appeal is not an appropriate vehicle for making significant inroads on the principles endorsed by Lord Diplock in *Birkett v. James*. The respondents are not represented and so their Lordships have not had the advantage of subjecting submissions by counsel in favour of such a change to the scrutiny which is a desirable condition of precedent to such a change.

Though in that judgment, his Lordship did affirm that:

> Although principle (1) links abuse of process with delay which is intentional and contumelious, the prevention of abuse of process has by itself long been a ground for the courts striking out or staying actions by virtue of their inherent jurisdiction irrespective of the question of delay and Lord Diplock's statement of the principles does not affect this separate ground for striking out or staying proceedings.

And, also recommended that:

> … The courts should more readily make 'unless orders,' that is, orders that an action should be struck out unless certain steps are taken at certain times. The advantage of such an order is that it places the onus on the plaintiff to justify the action being allowed to continue whereas in the case of an

> application to strike out the onus is on the defendant to show the action should be struck out." (See also *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630 – 'since obedience for peremptory orders of the court is the foundation of its authority …' salient *dictum* per Nicolas Browne VC.)

Indeed, though Lord Griffiths in *Department of Transport v. Chris Smaller (Transport) Ltd* [1989] AC 1197, Lord Griffiths, expressed some misgivings as to whether the principles laid down in *Birkett v. James* are satisfactory and adequate to deal effectively with excessive delays, yet however, his Lordship also concluded at p. 1206, "that the time was not appropriate to adopt a different approach in accordance with Practice Statement (Judicial Precedent) [1966] 1 WLR 1234".

Clearly, the case-genesis for the principle that an action may be dismissed without the need to show prejudice to the defendant – for abuse of process grounded upon prejudice caused to the due administration of justice – was affirmatively established only at the lower level by the Court of Appeal in *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd and Others, Chishty Coveney and Co v. Raja* (TLR 29 December 1997 at p. 698) and *Choraria v. Sethia* (TLR 29 January 1998 at p. 43). *Arbuthnot* sets out the principles, whereas *Choraria* gave definition to the word "abuse of process". The speech of Lord Woolf, Master of the Rolls, in *Arbuthnot* must be quoted in extensio in order to distil the rationale of his views. This is what he had to say:

> … That process was now being introduced. The new unified rules were intended to come into force in April 1999. However, many aspects of the process could be introduced while the existing Rules of the Supreme Court and County Court Rules were in force. Most of the powers which the court required for the purposes of case management were already contained in the existing rules. The gradual change to a managed system which was taking place did impose additional burdens upon the courts, involving the need for training and the introduction of the necessary technological infrastructure. It was therefore in the interests of litigants as a whole that the court's time was not unnecessarily absorbed in dealing with the satellite litigation which was created by non-compliance with the timetables laid down in the rules. *In Birkett v. James the consequence of inordinate delay was not a consideration which was in issue. From now on it was going to be a consideration of increasing significance. Litigants and their legal advisers had therefore to recognise that in the future any delay which occurred would be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it was, but also in relation to other litigants and the prejudice which was caused to the due administration of justice. The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.* It was already recognised by *Grovit v. Doctor* (The Times 25 April 1997; [1997] TLR 214; [1997] 1 WLR 640) that to continue litigation with no intention to bring it to a conclusion could

amount to an abuse of process. The change in culture which was already taking place would enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules was an abuse of process. While an abuse of process could be within the first category identified in *Birkett v. James*, it was also a separate ground for striking out or staying an action, which did not depend on the need to show prejudice to the defendant or that a fair trial was no longer possible. Ready recognition that wholesale failure as such to comply with the rules justified an action being struck out, as long as it was fair to do so, would save much time and expense relating to questions of prejudice, and allow the striking out of actions whether or not the limitation period had expired. The question whether a fresh action could be commenced would then be a matter for the discretion of the court when considering any application to strike out that action, and any excuse given for the misconduct of the previous action. In exercising its discretion whether to strike out the second action, the court should start with the assumption that if a party had had one action struck out for abuse of process some special reason had to be identified to justify a second action being allowed to proceed. (emphasis added)

The notable features of the above speech are as follows:

(i) The change to a managed system imposes additional burdens upon the courts and most of the powers which the court required for case management were already contained in the then existing rules.

(ii) Delay in future would be assessed not only from the point of view of prejudice caused to the particular litigants but also prejudice caused to the due administration of civil justice.

(iii) There is a change of culture which enables the courts to recognise for the future more readily that a wholesale disregard of the rules or to continue litigation with no intention to bring it to a conclusion was an abuse of process whereby an action could be dismissed without the need to show prejudice to the defendant or that a fair trial was no longer possible.

(iv) Ready recognition of this new principle of dismissal of the action would save much time and expense relating to proof of prejudice.

(v) Though it was then the common practice of the courts not to dismiss an action for want of prosecution if the limitation period of the cause of action of the case had not expired, yet with this new principle an action may be dismissed for want of prosecution where abuse of process had been shown whether or not the limitation period had expired.

(vi) Indeed, if an action has been dismissed for abuse of process some special reason has to be identified to justify a second action being allowed to proceed.

(vii) The new approach should not be applied retrospectively.

As to what constitutes "abuse of process" I could not do more than to quote what Lord Justice Nourse said in *Choraria*. This was how he put it:

> Although **inordinate and inexcusable delay alone, however great, did not amount to an abuse of process,** delay which involved complete, total or wholesale disregard, put it how you will, of the rules of court with full awareness of the consequences, was capable of amounting to such an abuse, … (emphasis added)

And, more precisely "total or wholesale disregard of the rules" was, in the same judgment, laid down as:

> The plaintiff's failure to comply with an order to set down after he had survived the first application to strike out was, at the least, a piece of breathtaking insouciance. **Combining it with all his previous defaults,** he had acted in wholesale disregard of his obligations. (emphasis added)

Thus, even upon the authority of *Arbuthnot* and *Choraria*, inordinate and inexcusable delay alone on the part of the plaintiff does not absolve the defendant from the onus of showing that prejudice had occurred thereby, although such prejudice need not be shown if the plaintiff's default is compounded by previous defaults such as would constitute an abuse of process. In my view, this approach in the two above cases is wholly consistent with reason and fairness.

Closer home, another situation of "abuse of process" recognised by our courts is as occurred in the case of *Te Cheng Hoi v. Peh Im Kweng* [1994] 3 CLJ 501, where I had occasion to hold:

> Due to the peculiar nature of the claim whereby a claim for ejectment formed no part of the claim (neither is it an O. 89 application) this court accepts the contention of the defendant's counsel that the plaintiff's delay in filing the statement of claim was intentional and contumelious; and by maintaining the benefit of the post-injunction *status quo* for years without a statement of his claim, the plaintiff had abused the court process to prolong a litigation in order to exhaust the defendant's finances and thus to force the defendant to quit on his own. See *Wallersteiner v. Moir* ([1974] 3 All ER 217; [1974] 1 WLR 991). The delay is that much more contumelious when the court has to consider that the plaintiff had secured the benefit of an interim injunction (it being an equitable relief) upon a discretion exercisable by the court only in very exceptional circumstances, in the absence of a statement of claim.

And with respect, I must add that the decision of our Court of Appeal in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v. Lee Boon Tin* [1998] 4 CLJ 368 have, quite rightly – in view of the new case

flow management era that we are inexorably moving towards – recommended the adoption of the principles stated in the above two English Court of Appeal decisions.

The above recommendation was expressed by our Court of Appeal when allowing the plaintiff's appeal against my decision in *Lee Boon Tin v. Trustees of Leong San Tong Khoo Kongsi* [1996] 2 BLJ 268 (notably, a pre-*Arbuthnot* and *Choraria* decision) where I had found that though the plaintiff had committed inordinate delay the defendants had not condescended upon essential particulars to buttress their **general** averment in their affidavit in support *inter alia* that:

> (ii) With the passing of time, the memory of the witnesses are vague and it is not possible for them to give detailed and correct evidence of the incident.
>
> (viii) Some of the defendants' witnesses had left the employment of the defendants and we encounter problems tracing them, and this is detrimental to the defence of the defendants.

This was essential as not mere prejudice but serious prejudice has to be made out to the satisfaction of the court. Therein, I was persuaded to hold this view as I had adopted the views of the Supreme Court in *United Malayan Banking Corporation Bhd v. Palm and Vegetable Oils (M) Sdn Bhd* [1994] 3 CLJ 144 where it was held that such essential particulars ought to be furnished and the key witnesses should be specified and identified. I had readily subscribed to the views expressed by Mohd Dzaiddin SCJ (as he then was) in that case where in the following lucid terms he said (at p. 149):

> Considering the grounds of judgment, it would appear to us that his Lordship has misapplied the above principles, particularly on the question of 'serious' prejudice, **to the given facts of the case.** His Lordship relied on paragraph 5(1) of the third respondent's affidavit alleging that nine years had passed by since the filing of the writ and, aside from important and key witnesses have died, the control of the plaintiff bank itself has changed hands a few times. It appears to us that **since this affidavit was filed, there has been no further evidence to show who are the key witnesses of the respondents who have since died.** (emphasis added)

Indeed in *Biss v. Lambeth, Southmark and Lewisham Area Health Authority* [1978] 2 All ER 125 the defendant had furnished details of the essential witnesses (who were nurses) and one of them who had gone to South Africa and the delay had "hopelessly prejudiced" their defence. Consequently, in *Lee Boon Tin*, upon the given available material then before me and also bearing in mind the vital consideration that the defendant's application was clearly grounded upon inordinate and inexcusable delay rather than 'abuse of process', I had no alternative but to dismiss the defendant's application.

Incidentally, in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v. Lee Boon Tin* the Court of Appeal was also of the view that (at p. 378):

> … **the learned judge had erred when he said that in order for the defendants to succeed there must be grossly inordinate delay.** We have gone through the authorities and we could not find anywhere to show that there must be grossly inordinate delay. The law clearly states that there must be inordinate and inexcusable delay and that the defendants had been prejudiced by it. Since the learned judge has found inexcusable and inordinate delay on the part of the respondent, the issue before us now is whether the appellants were prejudiced by that delay. (emphasis added)

Now, let us examine whether that was what was said or expressed or could be implied from what was expressed in *Lee Boon Tin v. Trustees of Leong San Tong Khoo Kongsi*. Totally in harmony with the material tenor of the judgment read as a whole, the relevant paragraph of my judgment reads as follows:

> After careful reading of the relevant affidavits, I find that there is *ex facie* inordinate delay on the part of the plaintiff in the filing of the summons for directions, **yet in all the circumstances of the case, though the delay is inordinate, it is not grossly inordinate.** If the delay is *ex facie* inordinate, the general rule is that there arises the natural inference that such delay is inexcusable. **But, if the delay is *ex facie* grossly inordinate (eg a delay of many years) then perhaps in my view, the court may draw an inference that such delay is likely to cause or has caused serious prejudice to the defendant** (see my *obiter dictum* in *Te Cheng Hoi v. Peh Im Kweng*). Be that as it may, as the delay in filing the summons for directions is *ex facie* inordinate, it is for the plaintiff to rebut the inference that it is inexcusable. On this score, I would agree with the defendants' contention that the plaintiff has not in his affidavit rebutted the inference that the delay is inexcusable. **Nevertheless, it is the final and vital question of the ingredient of prejudice that I shall now have to address myself.** (emphasis added)

The above discussions on the law on the topic would perhaps be incomplete without tendering a few of my observations on the changes brought about by the amendment PU(A)342/00 to the Rules of the High Court which has removed the old O. 34 *in toto* and substituted a new O. 34. As I have earlier said, the Court of Appeal in *Trustees of Leong San Tong Khoo Kongsi* was eminently correct in recommending the adoption of the principles laid down in the two English decisions on dismissal for want of prosecution of action – whereas in Singapore their old O. 34 is largely retained.

Making a comparative study of our case management provisions (in our new O. 34) and similar English and Singapore provisions I find that there is a dearth of expressed robust sanctions or teeth in our provisions to successfully

implement and carry through the often stated objective of the new case management regime. This is indeed surprising considering that considerable time is constantly expended by our judges in their valiant endeavour to productively manage cases.

As for the vehicle to carry out that recommendation, it is pertinent to note that the removal, *inter alia*, of rr. 2(2) and 8(1) of the old O. 34, has swept aside the defendant's right to apply to the court to dismiss the action for want of prosecution. And indeed, with the removal also of r. 8(2) the express provision and procedure enabling the court or judge to issue a show cause notice of dismissal for want of prosecution has also been taken away. Notably, under the new O. 34 the singular instance when the court could issue a show cause notice is under r. 2(2) (in Form 64) read with r. 3(2), when the plaintiff does not comply with r. 2(1) of the order by causing to be issued Form 63 – and even then the court may only strike out rather than dismiss the action.

It would appear that only r. 7 of the new order expressly empowers the court – and only in the process of case management – to make such order against the defaulting party 'as meets the ends of justice' should any party fail to comply with any direction given by the judge at any pre-trial conference. To be noted is that the word 'as meets the ends of justice' is somewhat nebulous and amorphous when juxtaposed with the phrase 'court to dismiss the action' for want of prosecution used in the old r. 2(2) and r. 8(1). In my opinion, perhaps the Rules Committee could have a relook at the new O. 34, if only to deal with cases of procedural breaches committed by laggardly or contumacious or contumelious parties before 22 September 2000 (effective date of PU(A)342/00).

It would be enlightening and of great assistance for us to now examine case management provisions in England and Singapore. The English Civil Procedure Rules 2000 (CPR) provide a wide range of robust sanctions to ensure enforcement of the case management provisions. Under CPR 3.4 the court may strike out a statement of case if it appears to the court:

(1) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(2) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(3) that there has been a failure to comply with a rule, practice direction or court order.

And, r. 24.2 enables the court to give summary judgment against a claimant or defendant where that party has no real prospect of succeeding on his claim

of defence. Both those powers may be exercised on **an application by a party or on the court's own initiative**.

Court's power to make order of its own initiative

3.3 – (1) Except where a rule or some other enactment provides otherwise, **the court may exercise its powers on** an application or of **its own initiative**.

(2) Where the court proposes to make an order of its own initiative:

(a) it may give any person likely to be affected by the order an opportunity to make representations; and

(b) where it does so it must specify the time by and the manner in which the representations must be made.

(3) Where the court proposes:

(a) to make an order of its own initiative; and

(b) to hold a hearing to decide whether to make the order,

it must give each party likely to be affected by the order at least 3 days' notice of the hearing.

(4) **The court may make an order of its own initiative, without hearing the parties** or giving them an opportunity to make representations.

(5) Where the court has made an order under paragraph (4):

(a) a party affected by the order may apply to have it set aside, varied or stayed; and

(b) the order must contain a statement of the right to make such an application.

(6) An application under paragraph (5)(a) must be made:

(a) within such period as may be specified by the court; or

(b) if the court does not specify a period, not more than 7 days after the date on which the order was served on the party making the application.

Re: Effect Of Rule

The court's duty of active case management includes narrowing the issues, controlling the timetable and moving the case forward quickly and efficiently (r. 1.4(2)(b), (c), (g) and (l)). **By giving him power to make orders on his own initiative, r. 3.3 enables the judge to manage cases proactively as well as reactively.** The judge has power to:

(1) make a provisional order containing a procedure for representations, eg, requiring representations to be made orally or in writing and fixing deadlines (r. 3.3(2)); or

(2) convene a hearing to decide whether to make a specified order (r. 3.3(3)); or

(3) make an order without hearing the parties or giving them an opportunity to make representations (r. 3.3(4)). In this instance the parties may later apply to set aside that order (r. 3.3(5) and (6)).

The new Singapore O. 34A (RC) is substantially an amalgamation of the existing procedures concerning the supply of information to the court after setting down the action, and the more recent development in the subordinate court process whereby the court is empowered to make orders and give directions for the just, expeditious and economical disposal of proceedings. Other provisions are included to ensure that this code of court supervision of the parties is supported by clear sanctions and is otherwise self-sufficient.

The driving force of this new order is r. 1(1), which provides:

> Rule 1(1) Notwithstanding anything in these Rules, the court may, at any time after the commencement of any proceedings, of its own motion direct any party or parties to those proceedings to appear before it, in order that the court may make such order or give such direction as it thinks fit, for the just, expeditious and economical disposal of the cause or matter.

The effect of this provision is that the court may intervene at any time in the course of the action to ensure its 'just, expeditious and economical disposal', and it may do so without being constrained by any other rule. Accordingly, under r. 1(1), the court has a general supervisory role at all stages of civil proceedings.

Order 34A r. 1 now contains ancillary sub-rules which buttresses the power of the court. Therefore, if a party fails to comply with any order made or direction given by the court under para. (1), the court may (under r. 1(2)) **dismiss the action, strike out the defence or counterclaim or make such other order as it thinks fit** (whereas in our O. 34 r. 7 the court may make such order 'as meets the ends of justice'). The court may, in exercising its powers under para. (1), make such order as to costs as it thinks fit. Furthermore, any judgment, order or direction given or made against any party who does not appear before the court when directed to do so under para. (1) may be set aside or varied by the court on such terms as it thinks just.

The remaining provisions of O. 34A operate 'without prejudice' to r. 1, and apply the principle of that rule specifically to the pre-trial stages of the suit. Indeed, the common thread throughout the whole of O. 34A is that the court

may intervene by making orders and giving directions whenever it is just, expeditious and economical to do so. Therefore, the court may:

> … at any time before any action or proceedings are tried … direct parties to attend a pre-trial conference relating to the matters arising in the action or proceedings. (O. 34 r. 2(1))

As this provision indicates, pre-trial conferences are primarily intended: to discover whether the parties are minded to settle the action (and, when appropriate, to encourage them in this respect); to urge the parties to limit the issues in dispute where such an approach is justified; and, if settlement is not possible, to give all appropriate directions to ensure that the parties are ready for trial. The pre-trial conference was introduced in its original form in 1991 to resolve delays caused by the reluctance of parties to consider settlement until the very last moment, and to remedy the common practice of vacating trial dates, a consequence of unpreparedness for trial.

As the nature of the pre-trial conference requires the parties to freely discuss, and be candid about, their cases, they may have to make admissions against their interest. The parties are protected in this respect by the following rule:

> No communication of facts disclosed or of any matter considered in the course of a pre-trial conference in any action or proceedings shall be made to the court conducting the trial of the action. (O. 34A r. 7)

(See *Civil Practice in Singapore and Malaysia* by Jeffrey Pinsler, Butterworths Asia 2001.)

The court, having made directions under r. 2(2) or r. 3 may either on its own motion or upon the application of any party, if any party defaults in complying with any such directions, dismiss such action or proceedings or strike out the defence or counterclaim or enter judgment or make such order as it thinks fit (r. 2(3)). Any judgment or order made under r. 2(3) may be set aside by the court, on the application of the party, on such terms, if any, as it thinks just (r. 2(4)). At any time during the pre-trial conference where the parties are agreeable to a settlement of some or all of the matters in dispute in the action or proceedings, the court may enter judgment in the action or proceedings or make such order to give effect to the settlement (r. 2(6)).

Here, it is not uncommon for judge to encounter problems of counsel, for either or both parties, not attending court at a time appointed for case management – or the task is delegated to the chambering student who could only manage a youthful smile number 8 when questioned by the court on the facts or issues pertaining to the case file that they so faithfully carry. In Singapore, in order to ensure that case management efforts are productive, the intended counsel or counsel having conduct of the trial are required to attend

the pre-trial conference, and the resounding caveat against such indifference to case management is expressed in O. 34A r. 6(1) as follows:

> 6(1) If, at the time appointed for the pre-trial conference, one or more of the parties fails to attend, **the Court may dismiss the action** or proceedings or strike out the defence or counterclaim **or enter judgment** or make such other order as the Court thinks fit.
>
> (2) An order made by the Court in the absence of a party concerned or affected by the order may be set aside by the Court, on the application of that party, on such terms as it thinks just. (emphasis added)

(But the party would have to show cogent reasons for non-appearance and that his case has merit.) In contradistinction, the similar Malaysian provision (under O. 34 r. 3) only empowers the court to strike out the action or 'such order as meets the ends of justice' where the plaintiff or counsel fail to appear, whereas judgment may be entered against the defendant should he or his counsel fail to attend.

I shall now apply the principles laid out and discussed above to the facts and circumstances found in the defendants' appeal now before me. Shortly stated, the issues for determination are, whether:

(1) there was inordinate and inexcusable delay (pre-and post-action) by the plaintiffs in the management of their case;

(2) the delay, if inordinate, had caused serious prejudice to the defendants;

(3) the conduct of the defendants themselves disentitle them to the order sought for dismissal of the action for want of prosecution; and

(4) the delay has caused prejudice to the due administration of civil justice.

On The First Issue

I find that there was no pre-trial delay as the claim was filed on 17 August 1996 on a cause of action which arose only on or about 21 March 1996 when the defendants by their letter dated 21 March 1996 (exh. 'TRM5' of encl. 23) gave notice of their intention to repudiate the said agreement (see *Nasri v. Mesah* [1971] 1 MLJ 32 and *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ (Rep) 266). In regard to post-action delay, it was contended that the then lawyer having conduct of the plaintiffs' matter had failed to file the relevant cause papers and set the action down for trial within the 45 days of the order of 26 December 1997. According to the plaintiffs that lawyer left the law firm in May 1998 but her failure to file the relevant cause papers was only discovered sometime at the end of 1998, whereupon the order of 16 December 1997 was drawn up and filed. However, owing to the difficulty in extracting the draft order (which was re-filed on

19 September 2000), the law firm failed to proceed further with the filing of the relevant papers until the notice to show cause was received. In this regard, I find that there was inordinate and inexcusable post-action delay by the plaintiffs in the management of their case as it is trite law that any shortcoming in the running of a law office would not constitute reasonable grounds for an exercise of a court's discretion; as the parties in a suit are a constant feature in a case, any default committed by their counsel ought to be ascribed, attributed and assigned to the litigant concerned.

On The Second Issue

The defendants allege that they have suffered prejudice as one of their witnesses namely, Omar bin Johar has passed away and another, Mohd Desa Akib suffers from diabetes.

On this I find that the defendants have suffered no serious prejudice or substantial risk that a fair trial is not possible for the following reasons:

(a) Upon a perusal of exh. 'B11' of encl. 19, it appears that Encik Omar bin Johar died on 16 December 1997, which is the same day the order for directions was made. Thus, even if the order for directions had been complied with, the defendants would have had to prepare for trial without the benefit of Encik Omar bin Johar's oral testimony. In any event one would have expected that when the action was filed, a witness statement or a statutory declaration would have been taken from Encik Omar;

(b) Encik Mohd Desa Akib left the employ of the defendants on 21 December 1994 (before the commencement of the action) and there is neither evidence adduced by the defendants to prove that Encik Mohd Desa Akib is seriously ill nor any affidavit by Encik Mohd Desa Akib himself to this effect. (See *United Malayan Banking Corporation Bhd v. Palm and Vegetable Oils (M) Sdn Bhd (supra)*);

(c) The defendants can produce other witnesses who were also party or privy to the matters in the instant action, for example, Mr. Hatta as referred to in exh. 'B5' of encl. 19 and exh. 'TRM6' of encl. 28. Also, the records of the defendants should still remain intact;

(d) Perhaps the defendants had not conscientiously prepared their defence in this matter and if so this could be the cause of any prejudice they may have suffered, if indeed there was any.

On The Third Issue

Prior to the hearing of the show cause on 16 August 2000, the defendants had also failed to comply with the order for directions dated 16 December 1997 in failing to file and serve a list of documents and to offer the said documents for inspection. In fact, the defendants only filed their list of

documents on 23 October 2000, **after** the plaintiffs had, pursuant to the learned judge's directions, filed their own list as well as notice to set down for trial. If the court had not issued the notice to show cause, the defendants would have continued in their slumber. We have to be mindful that under the old O. 34 r. 8 the court could give the notice to show cause if the defendants have not made an application to dismiss the action under sub-r. (1). Unfortunately here, the defendants made the application under sub-r. (1) only after this court had invoked its powers under sub-r. (2). This sequence in the procedural management of a case is of material consideration on the question of the defendants' own conduct, which I find disentitles them to this court's assistance.

In deciding this issue it is illuminating to read the decision of the Supreme Court in *United Malayan Banking Corporation Bhd v. Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 CLJ 144 where Mohamed Dzaiddin SCJ (as he then was) at p. 149 had this to say:

> Thirdly, the learned judge overlooked the fact that the respondents themselves have yet to file their list of documents within the stipulated period under the order of the senior assistant registrar in the summons for directions. This is certainly a factor to be taken into account as to whether the respondents have contributed to the delay.

In this regard reference is also made to the decision of the Singapore High Court in *Lee Mun Tuck v. Tan Chin Kah & Anor* [1991] 1 CLJ 631; ([1991] 4 CLJ (Rep) 929 at p. 633 (p. 932):

> Where two parties, like in the present case, are equally guilty of inordinate delay, I do not see why this court should be more harsh towards one party than the other. In such circumstances, I think the court should not favour any one party and justice would demand that the case be permitted to proceed. He who comes to court to complain that the other party is guilty of delay and seeks the discretion of the court should not himself be guilty of non-compliance with the rules. I am unable to disregard the conduct of the defendant and or her solicitors.
>
> … But in a case like the present where both parties are equally at fault, equity would demand that I do not assist either party.

I would therefore hold that the defendants have also contributed to the post-summons delay. Equity demands that this court at this juncture assists neither party.

On The Fourth Issue

At the hearing of the show cause on 16 August 2000, the learned judge of the court considered the explanation of the plaintiffs and permitted the plaintiffs to proceed with the action apparently after having read the affidavit of Tan

Swee Hock affirmed on behalf of the defendants on 14 August 2000. The learned judge also gave the plaintiff time to regularise its cause papers and to enter the action for trial. The learned judge then scheduled the matter for case management on 23 October 2000. And, most importantly, the plaintiffs had complied with the said directions by 23 October 2000 and regularised the default after the learned judge gave the plaintiffs time to file the necessary cause papers.

As the defendants did not lodge any application under the old O. 34 r. 8(1) of RHC before the said notice they cannot now belatedly be seen to come with an application for dismissal for want of prosecution under the same provision, and request that the court ignore the grace period allowed to the plaintiffs by the learned judge on 16 August 2000. This is especially so, as the defendants' affidavit affirmed on 14 August 2000 in support of the said notice to show cause and encl. 19 are both substantially similar if not identical in content. As such, due to the non-dismissal of the action on 16 August 2000 in the teeth of the defendants' affidavit dated 14 August 2000 before the learned judge, this court would appear to be back tracking on its decisions should it now entertain a similar application to dismiss. It was also submitted by counsel for the defendants that the learned judge had said that the defendants are at liberty to apply for dismissal of the suit. However, there is nothing in the court record to indicate this. Notably, had encl. 25 been before his Lordship on 16 August 2000, it could more plausibly be concluded that the show cause notice was never dealt with. Indeed, the hearing of the show cause notice would not then have been adjourned to 23 October 2000 but a date would at that point in time have been set for hearing of encl. 25.

Further, on the principle of stare decisis, bearing in mind the decision of the Federal Court in *Public Finance v. Natcom Development Sdn Bhd & Ors* [1996] 4 CLJ 291 I have to regard this issue as being rendered academic as the primary facts of the current case bears a striking similarity to the facts in *Natcom*. This could be gleaned from the words of Gopal Sri Ram JCA who delivered the judgment of the court at pp. 298-299 as follows:

> That said, in the present case, it was perfectly open to the learned judicial commissioner to have rejected the explanation proffered by the legal advisers of the plaintiff and to have dismissed the suit when it first came up before him, pursuant to the show-cause notice, on 13 February 1994. But he chose not to do so. *Instead, he gave the plaintiff further time to enter the action for trial. That he did so on compassionate grounds is wholly irrelevant. The fact remains that his decision to grant the plaintiff further time rendered the preceding delay academic. His reference to, and reliance upon, that delay was clearly wrong and amounts to a misdirection on his part.*
>
> …

> Third, the learned judicial commissioner appears to have given little weight to the fact that the relevant papers to set the action down for trial had been filed, *albeit* beyond the one month requested for by counsel. That there was no undertaking given puts paid to the learned judicial commissioner's view that the month was exceeded. Once the action had been duly entered for trial, it would have been far better for the judicial commissioner to have fixed a date for hearing and disposed of the suit on its merits. The fact that the month requested for had been exceeded takes one nowhere. The learned judicial commissioner was, therefore, plainly wrong in punishing the plaintiff for exceeding the month in question. (emphasis added)

In conclusion, it must be observed that since the filing of the notice of setting down for trial on 10 October 2000, the defendants had continued to pursue this course of action to dismiss the action for want of prosecution, which by itself, is exacerbating the very delay and prejudice the defendants allege has occurred. The defendants would have been better served if they gird themselves to defend this action on the merits. Ultimately, the onus is still on the plaintiffs to prove their claim herein.

In the circumstances, the decision of the SAR is affirmed and the defendants' appeal is dismissed with costs.